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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 787

STATE ATHLETIC COMMISSION,

Appellant,

versus

JOSEPH DORSEY, JR.,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

MOTION TO AFFIRM

LOUIS BERRY
4226 South Central Avenue
Los Angeles 11, California

ISRAEL M. AUGUSTINE, JR.
PRUDHOMME F. DEJOIE
1479 No. Claiborne Avenue
New Orleans 16, Louisiana

THURGOOD MARSHALL
JACK GREENBERG
Suite 1790
10 Columbus Circle
New York, N. Y.

Attorneys for Appellee

ELWOOD CHISOLM
JAMES M. NABRIT, III
Of Counsel

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Appellee in the above-entitled case moves to affirm on the ground that the questions presented are so unsubstantial as not to need further argument.

Opinion Below

The opinion of the three-judge United States District Court for the Eastern District of Louisiana, New Orleans Division, is now reported at 168 F. Supp. 149.

Statutes

The statute and regulation declared unconstitutional by the District Court are Louisiana Revised Statutes of 1950, 4:451 et seq. (Acts 1956, No. 579), and Rule 26 of the Rules and Regulations of the State Athletic Commission.

Questions Presented

Appellee, for the purposes of this motion, adopts the "Questions" as presented by appellant at pages 3-4 of its Jurisdictional Statement.

REASON FOR GRANTING THE MOTION

The Questions Presented Are Unsubstantial

I.

Where a state agency purports to act under state authority and invades rights secured by the Federal Constitution it is subject to the process of the federal courts, and an action seeking appropriate relief against such an agency is not prohibited by the Eleventh Amendment.

Appellant State Athletic Commission concedes, as it must, that if this action had been brought against the individual members of the State Athletic Commission, that it would not be prohibited as a suit against the state within the meaning of the Eleventh Amendment to the Constitution of the United States.[1] However, appellant asserts that a distinction may be drawn between suits against individuals comprising a state board and suits against the state board, arguing that the principle uniformly applied to the former may not be applied against the latter.

[1] Among the many decisions by this Court which require the concession made by appellants are: Gunter v. Atlantic Coast Line R. Co., 200 U. S. 273 (1906); Prout v. Starr, 188 U. S. 537 (1903); Smyth v. Ames, 169 U. S. 466 (1898); Tindal v. Wesley, 167 U. S. 204 (1897); Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362 (1894); Pennoyer v. McConnaughy, 140 U. S. 1 (1891); Ex Parte Young, 209 U. S. 123 (1908); Alabama Public Serv. Comm. v. Southern R. Co., 341 U. S. 341 (1951); Sterling v. Constantin, 287 U. S. 378 (1932); Georgia R. & Bkg. Co. v. Redwine, 342 U. S. 299 (1952); and many other cases collected at 43 A. L. R. 408.

The court below carefully considered the contention and it is submitted that its disposition of the question was eminently correct. After citing *School Board of Charlottesville* v. *Allen* (4th Cir. 1956), 240 F. 2d 59, cert. den. 353 U. S. 910 (1957) and *Orleans Parish School Board* v. *Bush* (5th Cir. 1957), 242 F. 2d 156, cert. den. 354 U. S. 921 (1957) the court below wrote at 168 F. Supp. 149, 151:

> "The short answer to the Commission's contention is that Dorsey's suit is not against the State of Louisiana, in name or in effect. It does not attempt to compel state action, but to prevent illegal action of the Commission. As Judge Tuttle stated in the Bush case: 'If in fact the laws under which the Board here purports to act are invalid, then the board is acting without authority from the State and the State is no-wise involved.' A state can act only through agents. Whether the agent is an individual official or a Commission, the agent ceases to represent the state when state power is used in violation of the United States Constitution.
>
> "There is no merit to the defendant's contention that the plaintiff should have sued the members of the boxing Commission individually. We agree with the court in School Board of City of Charlottesville v. Allen that . . . 'if high officials of the state and of the federal government may be restrained and enjoined from unconstitutional action, we see no reason why a school board [or any other state Commission] should be exempt from such suit merely because it had been given corporate powers.' In Browder v. Gayle, D. C., 142 F. Supp. 707, aff'd 352 U. S. 903, . . . the court indicated that it is not necessary to sue the members of a Commission individually when no special relief is sought against them by way of damages.

> In the case before us the plaintiff is seeking relief from action of the state's agent, the State Athletic Commission, in its collective capacity as a commission."

Furthermore, *Governor of Georgia* v. *Sundry African Slaves,* 26 U. S. 110 (1828), relied upon by appellant, does not support the argument made. That was an action against the Governor of a state rather than a state agency, but in any event it was litigated prior to the adoption of the Fourteenth Amendment. Cf. *Sterling* v. *Constantin,* 278 U. S. 378 (1932).

That the distinction urged by appellant is without merit is further demonstrated by *Hopkins* v. *Clemson Agricultural College,* 221 U. S. 636 (1911) in which no natural persons were named defendants. That case held:

> ". . . a void act is neither a law nor a command. It is a nullity. It confers no authority. It affords no protection. Whoever seeks to enforce unconstitutional statutes, or to justify under them, or to obtain immunity through them, fails in his defense and in his claim of exemption from suit." (At 644)

Moreover, ". . . [I]t cannot matter that the agent is a corporation rather than a single man." *Sloan Shipyards Corp.* v. *United States Shipping Board Emergency Fleet Corporation,* 258 U. S. 549, 567 (1922). The Fourteenth Amendment is addressed "to the states, but also to every person, whether natural or juridical, who is the repository of state power." *Home Telephone & Tel. Co.* v. *City of Los Angeles,* 227 U. S. 278, 286 (1913).

Disposing of an identical contention by reference to *Brown* v. *Board of Education,* 347 U. S. 483 (1954), the Fourth Circuit remarked in *School Board of Charlottesville* v. *Allen, supra* at 63, that it was "not reasonable to

suppose that the Supreme Court would have directed injunctive relief against school boards acting as state agencies, if no such relief could be granted because of the provisions of the Eleventh Amendment to the Constitution."

II.

A State Statute and an administrative regulation prohibiting prize fights between persons of different races plainly violates rights protected by the Fourteenth Amendment to the Constitution of the United States.

The opinion of the court below is unquestionably correct, and the appeal presents no substantial question on the merits, for the statute and regulation in question (1) effect a racial discrimination, contrary to the equal protection and due process clauses of the Fourteenth Amendment and (2) impair the right to pursue a lawful occupation contrary to the due process clause of that amendment.

(1) With respect to racial discrimination see, of course, *Brown* v. *Board of Education,* 347 U. S. 483 (1954); *Bolling* v. *Sharpe,* 347 U. S. 497 (1954). It has been repeatedly held, in cases relied upon by the court below, that the fundamental constitutional principles of the *Brown* and *Bolling* cases are not to be restricted to public education. *Browder* v. *Gayle,* 142 F. Supp. 707 (1956), affirmed 352 U. S. 903; *Dawson* v. *Mayor and City Council of Baltimore City* (4th Cir. 1955), 220 F. 2d 386, affirmed 350 U. S. 877; *Department of Conservation* v. *Tate* (4th Cir. 1956), 231 F. 2d 615 cert. den. 352 U. S. 838; *City of Petersburg* v. *Alsup* (5th Cir. 1956), 238 F. 2d 830 cert. den. 353 U. S. 922; *Morrison* v. *Davis* (5th Cir. 1958), 252 F. 2d 102 cert. den. 356 U. S. 968.

(2) Concerning the right of appellee to pursue his calling free from arbitrary racial restrictions it is to be remembered that while professional boxing is subject to regulation by the state, all regulation must be within the limitations imposed

by the Constitution of the United States. *Harvey* v. *Morgan*, Tex. Civ. App., 1954, 272 S. W. 2d 621 is similar to this case. The Texas Court of Civil Appeals, following the rationale of the *Brown* case, invalidated a statute which prohibited boxing matches, etc. between "any person of the Caucasian or 'white' race and one of the African or 'Negro' race."[2]

See *Truax* v. *Raich*, 239 U. S. 33, 41 (1915) in which the Court ruled that the authority of the states:

> . . . "does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood it requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."

See also *Takahashi* v. *Fish & Game Commission*, 334 U. S. 410 (1948); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886).

III.

The appellee had standing to challenge the statute and regulation involved herein.

Appellant's objection that appellee had no license as a prize fighter in Louisiana, *on the date of trial*, and that this fact deprives him of standing or sufficient interest to press this action is clearly unsubstantial. The statement of the Court below is a sufficient answer. The Court found that:

> Dorsey was issued a license for 1957. He has no license for 1958, but the Commission's policy is to issue a license to a prize fighter only on the date of a scheduled fight and then only after the fight has been

[2] The quoted phrase from the Texas statute is identical to a portion of Louisiana's Commission Rule 26, involved in this case.

held and the boxer's license fee deducted from his share of the purse. The Commission admits the essential allegations of Dorsey's complaint and admits also that it would not allow Dorsey to engage in a mixed prize fight in Louisiana. (At 168 F. Supp. 150-151)

And of course, it was admitted by the answer that Dorsey was licensed and in good standing when the action was commenced.

In any event, Dorsey's interest is no less substantial than that of the plaintiffs in *Truax* v. *Raich, supra,* at 38-39, and *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925).

CONCLUSION

For the foregoing reasons, the questions presented by appellant are clearly unsubstantial and this motion to affirm should be granted.

Respectfully submitted,

Louis Berry
4226 South Central Avenue
Los Angeles 11, California

Israel M. Augustine, Jr.
Prudhomme F. Dejoie
1470 No. Claiborne Avenue
New Orleans 16, Louisiana

Thurgood Marshall
Jack Greenberg
Suite 1790
10 Columbus Circle
New York, N. Y.

Attorneys for Appellee

Elwood Chisolm
James M. Nabrit, III
Of Counsel